IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

SUMMONS FOR JUDGMENT NO.745 OF 2005

IN

SUIT NO.2595 OF 2005

...

Indofil Chemicals Company,
A Division of Modipon Ltd. ...Plaintiff

v/s.

The Rishabh Velveleen Ltd. ...Defendant

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Mr.Shyam Mehta i/b M/s.Crawford Bayley & Co. for the Plaintiff.
Mr.Salim Malik for the Defendant.

...

CORAM: D.K.DESHMUKH, J.

DATED: 12TH JULY, 2006

P.C.:

1. The Plaintiff has filed the suit for recovery of an amount of Rs.2,51,02,758.49 with interest. The facts that are material and relevant are as under:

. The Plaintiff and the Defendant are companies registered under the Companies Act. The Plaintiff manufactures various adhesives including flock binders. The brands of the flock binders manufactured by the Plaintiff are Indofil K87, Indofil HA-8(I), Indofil HA-16, Indofil LC-40, Indofil FLB and Indofil FBSV. These flock binders are used in the production of flocked fabric. According to the Plaintiff, the Defendant has been purchasing flock binders from the Plaintiff for over last 10 years. According to the Plaintiff from November, 2004 to May, 2005 the Defendant placed various orders on the Plaintiff for the purchase of different brands of flock binders manufactured by the Plaintiff. Pursuant to those orders the Plaintiff

supplied the flock binders to the Defendant and issued invoices to the Defendant in that regard. According to the Plaintiff, the flock binders that were supplied by the Plaintiff were duly received by the Defendant. According to the Plaintiff, the purchase orders placed by the Defendant together with invoices represents the written contract between the Plaintiff and the Defendant, on which the present summary suit has been filed. The Plaintiff has filed at Exh.A statement of outstanding dues from the Defendant. That statement gives the details about the purchase orders placed by the Defendant and invoices issued by the Plaintiff. The Plaintiff sought leave of the court to rely upon the purchase orders and the invoices.

2. According to the Plaintiff, it is manufacturing the flock binders on the basis of standard composition. Though the Defendant has been placing orders for supply of flock binders for about 10 years, the Defendant never specified any specific composition for the flock binders that were to be supplied by the Plaintiff to the Defendant. Therefore, the Plaintiff was supplying to the Defendant the flock binders of standard composition.

As per the purchase orders of the Defendant, the Plaintiff was required to furnish to the Defendant test reports along with the test method applied in respect of the flock binders supplied by the Plaintiff. According to the Plaintiff, the Plaintiff tested the flock binders and furnished the test reports called Certificates of Analysis along with each batch of flock binders. According to the Plaintiff, the Defendant till date has not disputed any of the certificates of analysis. According to the Plaintiff, as per the purchase orders of the Defendant, the Defendant was to make payment for the flock binders supplied by the Plaintiff within 90 days of the delivery. But the Defendant did not make payment within the period of 90 days. It is submitted that from the middle of the year 2004, the Defendant started making default in making timely payment of the dues of the Plaintiff, and therefore, the Plaintiff addressed several letters, email etc. to the Defendant demanding the payment. Though the payments were delayed, the Defendant continued to place purchase orders on the Plaintiff, the Plaintiff continued to supply the flock binders to the Defendant till May, 2005. After, which the Plaintiff stopped accepting purchase orders from the Defendant

in view of huge amount that was outstanding. The Plaintiff states that the Defendant has made payment towards the earlier invoices for the period prior to November, 2004. Payment against invoices issued from November, 2004 are outstanding. The Plaintiff further states that on 11th March, 2005 the Defendant informed the Plaintiff telephonically that lumps were observed in the FBSV flock binders supplied by the Plaintiff. According to the Plaintiff, the Defendant stated that these lumps were observed in two drums of FBSV flock binders. The Plaintiff immediately deputed one of his sales executive to the Defendant's factory to verify the complaint. Accordingly the complaint was verified on 12th March, 2005, and there was a meeting held between the representative of the Defendant and the sales executive of the Plaintiff and the minutes of that meeting have been reduced to writing and the Plaintiff has produced a copy of those minutes. According to the Plaintiff, on 12th March, 2005 the Plaintiff had advised the Defendant not to use the material which is found to be defective. According to the Plaintiff, a letter was written on 14th March, 2005 by the Plaintiff to the Defendant stating that polymerized lumps of approximately 5 kg. each was found in 2 drums and

therefore the Plaintiff advised the Defendant not to use the material in those two drums. According to the Plaintiff, for the first time by communication dated 15th March, 2005 the Defendant informed the Plaintiff that FBSV flock binder supplied by the Plaintiff is not giving satisfactory results for the last about two months and that therefore the customers of the Defendant had lodged complaints regarding poor abrasion and stiffness of the flocked fabric. It was stated that the customers of the Defendant had returned about 12000 mtrs. of fabric costing more than Rs.25 lakhs to the Defendant. According to the Plaintiff, the allegations made in the letter dated 15th March, 2005 were false. According to the Plaintiff, therefore immediately by letter dated 15th March, 2005 the Plaintiff advised the Defendant not to use the material complained about. The Plaintiff states that thereafter the Plaintiff had checked the FBSV flock binder for the quality and the Plaintiff found that it has been manufactured as per the standard manufacturing process. It is further stated that representative of the Plaintiff attended the Defendant’s factory on 18th March, 2005 and during the visit the Defendant showed to the Plaintiff’s representatives 3 drums of

FBSV flock binder in which lumps were found. At that time again meeting was held and a copy of the minutes of the meeting is annexed by the Plaintiff to the plaint. According to the Plaintiff, the Defendant continued to place the orders for the material with the Plaintiff in the meantime. It is further stated that the Defendant issued eight debit notes dated 31st March, 2005 to the Plaintiff for an aggregate amount of Rs.46,44,485/- corresponding to 74340 kgs. of flock binders. The Plaintiff asked the Defendant to return the rejected material in relation to which the debit notes were issued, but the Defendant did not return the material. According to the Plaintiff, the Defendant issued a debit note for Rs.2.5 crores dated 3rd June, 2005 claiming that amount from the Plaintiff on the ground that the Defendant was required to pay that amount to its customers because the flocked fabric manufactured by the Defendant and supplied to those customers was found to be defective because of poor quality of FBSV flock binders supplied by the Plaintiff to the Defendant. In these circumstances, the Plaintiff has filed this suit for recovery of the unpaid price of the flock binders supplied by the Plaintiff to the Defendant.

3. The Defendant has filed affidavit dated 30th March, 2006 disclosing its defence. The first defence put up by the Defendant is that in the purchase orders placed by the Defendant on the Plaintiff it is mentioned that the jurisdiction will be of the District Court in Haridwar. It is submitted that the goods were supplied by the Plaintiff pursuant to the acceptance of purchase orders. The orders were issued from Haridwar to the Plaintiff's Delhi office. The acceptance of purchase orders was communicated to the Defendant from Delhi. According to the Defendant, therefore, part of cause of action of the Plaintiff has arisen in Haridwar and because of endorsement on the purchase orders it is only the Court at Haridwar, which has jurisdiction to entertain the suit. According to the Defendant, no part of cause of action has arisen in Mumbai and therefore this court does not have the jurisdiction to entertain the suit. According to the Defendant, of the flock binders supplied by the Plaintiff to the Defendant, FBSV binders supplied by the Plaintiff to the Defendant after December, 2004 was defective. The product supplied after December, 2004 was of sub-standard quality. It is submitted that on receiving the product it was used by the Defendant in

manufacturing flocked fabric immediately. The Defendant did not realise that the sub-standard product has been supplied by the Plaintiff. They became aware that the Plaintiff has supplied sub-standard product only in February, 2005, because they received complaints from their customers that the flocked fabrics manufactured by the Defendant was found defective. According to the Defendant, this was brought to the notice of the Plaintiff in February, 2005. Therefore, a meeting was held between the Plaintiff and the Defendant on 12-3-2005. In that meeting, representatives of the Plaintiff accepted that the product supplied by the Plaintiff to the Defendant was defective and assured the Defendant that the Plaintiff will compensate the Defendant suitably. A promise was also made by the Plaintiff, according to the Defendant, that such lapses will not be repeated. According to the Defendant, the Plaintiff accepted the deficiency in the product by letter dated 14-3-2005. According to the Defendant, the Defendant by communication dated 15-3-2005 informed the Plaintiff that the Defendant's customers returned 12000 mtrs of clothes fabrics worth Rs.25 lakh, because it was found to be defective. According to the Defendant, the Plaintiff

promised the Defendant that future supplies under pending orders dated 14-2-2005 and 22-5-2005 of FBSV flock binders shall be defect free. According to the Defendant, the Defendant informed the Plaintiff not to make supply pursuant to the order dated 22-2-2005. The Defendant also sent debit note aggregating Rs.46,44,485/- to the Plaintiff as also debit note of Rs.2.5 crores, because that was the amount of loss suffered by the Defendant, because of the defective product supplied by the Plaintiff. The Defendant also states that the Defendant has suffered loss of Rs.5 crores due to supply of defective product by the Plaintiff and that a civil suit is being filed before this court for recovery of the amount of loss. According to the Defendant, though the Plaintiff supplied different brands of flock binders, defect was found only in FBSV flock binders and according to the Defendant, the present suit also relates to recovery of the unpaid price of only FBSV flock binders. It is the case of the Defendant that the defects in the product supplied by the Plaintiff could only be detected by the Defendant only after the product was actually used by the Defendant in manufacture of the flocked fabrics and not before. According to the Defendant, FBSV flock binders

supplied by the Plaintiff was actually used by the Defendant up to 31-3-2005. It is further submitted that the Defendant opened some drums, in which the Plaintiff had supplied the product randomly, and the product was found to be defective. According to the Defendant, last purchase order for FBSV flock binders was placed on 14-2-2005. The following purchase order dated 22-2-2005 was, however, cancelled by the Defendant. The last supply of FBSV flock binders was made by the Plaintiff on 19-3-2005, which was found defective by the Defendant. The material weighing 15 tones in 72 Drums, according to the Defendant, is lying in the factory of the Defendant. It is submitted that the case of the Plaintiff that product in only two drums was found to be defective is not correct. Those were only two sample drums wherein the product was found to be defective. According to the Defendant, though they found that the product was defective, they used the product till 31-3-2005, because the Plaintiff had assured that the product is defect free. According to the Defendant, FBSV flock binders supplied after December, 2004 up to February, 2005 was defective and this fact is recorded in the minutes of the meeting dated 12-3-2005. According to the Defendant, flocked fabric manufactured by the

Defendant was found to be defective by the customers of the Defendant and returned to the Defendant only because of defective FBSV flock binders supplied by the Plaintiff and used by the Defendant for manufacture of the flocked fabrics. The Defendant claims that because the flocked fabrics was defective, it was returned by their customers and the Defendant was required to issue credit notes of an amount of Rs.2.58 crores to their customers. The Defendant has furnished a summary of those credit notes. The defence of the Defendant, in short, is that because the present suit is only for recovery of FBSV flock binders supplied by the Plaintiff to the Defendant, that product was defective and therefore the Defendant suffered loss. Hence, the Defendant is not liable to pay the price of the FBSV flock binders supplied by the Plaintiff to the Defendant after December, 2004.

4. I have heard the learned Counsel appearing for both sides. So far as the objection to the jurisdiction of this court to entertain the suit is concerned, the case of the Defendant is that the purchase orders placed by the Defendant on the Plaintiff were delivered at Delhi office of the

Plaintiff. Perusal of the purchase orders, however, shows that they are addressed to the Plaintiff at its Mumbai office. There is no document placed on record by the Defendant to show that the purchase orders addressed to the Plaintiff at its Mumbai office were actually delivered at its New Delhi office. Therefore, at this moment, there is no material on record to show that the purchase orders were delivered by the Defendant to the Plaintiff at New Delhi office. The Defendant relies on the endorsement on its purchase order. The endorsement reads as under:-

"Jurisdiction Haridwar U.A. India"

The question is whether this endorsement to be found in the purchase order is enough to confer exclusive jurisdiction to try the suit between the parties on the court at Haridwar.

5. The Supreme Court in its judgment in the case of A.B.C. Laminart Pvt.Ltd. and anr. v/s. A.P. Agencies, Salem, (1989) 2 Supreme Court Cases 163, has considered following clause in the agreement,

"Any dispute arising out of this sale shall be subject to Kaira jurisdiction".

The Supreme Court, after considering the law on the point has held that this clause is not enough to confer exclusive jurisdiction on the court at Kaira. The relevant observation of the Supreme Court are to be found in paragraphs 20,21 & 22 of the judgment. It reads as under:-

> 20. When the court has to decide the question of jurisdiction pursuant to an ouster clause, it is necessary to construe the ousting expression or clause properly. Often the stipulation is that the contract shall be deemed to have been made as a particular place. This would provide the connecting factor for jurisdiction to the courts of that place in the matter of any dispute on or arising out of that contract. It would not, however, ipso facto take away jurisdiction of other courts. Thus, in Salem Chemical Industries v. Bird & Co. where the terms and conditions attached to the quotation contained an arbitration clause provided that: "any

order placed against this quotation shall be deemed to be a contract made in Calcutta and any dispute arising therefrom shall be settled by an arbitrator to be jointly appointed by us", it was held that it merely fixed the situs of the contract at Calcutta and it did not mean to confer an exclusive jurisdiction on the court at Calcutta, and when a part of the cause of action had arisen at Salem, the court there had also jurisdiction to entertain the suit under Section 20(c) of the Code of Civil Procedure.

21. From the foregoing decisions it can be reasonably deduced that where such an ouster clause occurs, it is pertinent to see whether there is ouster of jurisdiction of other courts. When the clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of ad idem can be shown, the other courts should avoid exercising jurisdiction. As regards construction of the ouster clause when words like ‘alone’, ‘only’, ‘exclusive’ and the like have been used there may be no

difficulty. Even without such words in appropriate cases the maxim ‘expressio unlus est exclusio alterius’- expression of one is the exclusion of another- may be applied. What is an appropriate case shall depend on the facts of the case. In such a case mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract an intention to exclude all others from its operation may in such cases be inferred. It has therefore to be property construed.

22. Coming to clause 11 we already found that this clause was included in the general terms and conditions of sale and the order of confirmation No.68/59 dated October 2, 1974 with the general terms and conditions was sent from Udyognagar, Mohmadabad, Gujarat to the respondent’s address at 12 Suramangalam Road Salem, Tamil Nadu. The statement made in the special leave petition that udyognagar, Mohamadabad, Gujarat is within the jurisdiction of the civil court of Kaira has not been controverted. We have already seen

that making of the contract was a part of the cause of action and a suit on a contract therefore could be filed at the place where it was made. Thus, Kaira court would even otherwise have had jurisdiction. The bobbins of metallic yarn were delivered at the address of the respondent at Salem which, therefore, would provide the connecting factor for court at Salem to have jurisdiction. If out of the two jurisdictions one was excluded by clause 11 it would not absolutely oust the jurisdiction of the court and, therefore, would not be void against public policy and would not violate Sections 23 and 28 of the Contract Act. The question then is whether it can be construed to have excluded the jurisdiction of the court at Salem. In the clause 'any dispute arising out of this ale shall be subject to Kaira jurisdiction' ex facie we do not find exclusionary words like 'exclusive' 'alone' 'only' and the like. Can the maxim 'expressio unlus est exclusio alterius' be applied under the facts and circumstances of the case? The order of confirmation is of no assistance. The other

> general terms and conditions are also not indicative of exclusion of other jurisdictions. Under the facts and circumstances of the case we hold that while connecting factor with Kaira jurisdiction was ensured by fixing the situs of the contract within Kaira, other jurisdictions having connecting factors were not clearly, unambiguously and explicitly excluded.. That being the position it could not be said that the jurisdiction of the court at Salem which court otherwise had jurisdiction under law through connecting factor of delivery of goods thereat was expressly excluded. We accordingly find no error or infirmity in the impugned judgment of the High Court.

6. In the present case, one of the courts having jurisdiction to entertain the suit would be the court at Haridwar, but the endorsement quoted above found in the purchase order in view of the law laid down by the Supreme Court quoted above, is not enough to confer exclusive jurisdiction on the court at Haridwar. The purchase orders as observed above issued by the Defendant were addressed to the

Plaintiff at Mumbai office. Payments were also made at Mumbai. Therefore, part of cause of action would arise within the jurisdiction of this court. In the invoices under which the material was supplied by the Plaintiff it is clearly stated " This business transaction is subject to the jurisdiction of Mumbai High Court only." In these circumstances, therefore, in my opinion, it cannot be said that this court does not have the jurisdiction to entertain the suit.

7. What is pertinent to be noted here is that though the Defendant claims that this court does not have jurisdiction to entertain this suit, which arises out of the transaction of sale of the adhesive by the Plaintiff to the Defendant, in paragraph 9 of the affidavit filed by the Defendant the Defendant has stated that the Defendant intends to file a suit in this Court for recovery of damages that were suffered by the Defendant due to supply of defective material by the Plaintiff. The Defendant states thus in paragraph 9,

"The defendant has filed a suit for recovering of such damages and general damages running in to Rs.5.00 Crores in this Hon’ble Court. The defendant

craves leave to rely upon the proceeding in suit to be filed in this Hon'bel Court."

Therefore, it is clear that the Defendant also intends to file a civil suit not in the court at Haridwar, but in this court. In my opinion, therefore, even according to the Defendant this court, has the jurisdiction over the subject matter of the dispute between the parties.

8. The Plaintiff in paragraph 4 of the plaint has stated thus:-

> The Plaintiff states that from November 2004 to May 2005 the Defendant placed various purchase orders on the Plaintiff for the purchase of different brands of flock binders manufactured by the Plaintiff. While most of the purchase orders were written, some were verbal. The Plaintiff duly supplied the flock binders to the Defendant and issued invoices to the Defendant in that regard.

9. Thus it is a clear case of the Plaintiff that the

Plaintiff was supplying various types of flock binders to the Defendant and that this suit has been filed for recovery of unpaid price of those various types of flock binders. Paragraph 4 of the plaint is replied to by the Defendant by paragraph 12 of the affidavit. Paragraph 12 reads as under:-

> 12. The Plaintiffs have mislead the Hon'ble Court when they aver in para 4 of the plaint that from November 2004 to May 05, the defendant placed various purchase orders on the Plaintiff for the purchase of "different brands of Flock Binder manufactured by the Plaintiff". Factually, the subject matter of the suit is FBSV flock binder and for which last order was placed on 22-2-2005 and this was cancelled because Plaintiff did not rectify the defect as promised. The order placed after 22-2-2005 was for an other brand of binder. It is though correct that the contracts (supplies) were ex-works but the delivery was inter-state and therefore a door delivery. The Plaintiff had charged the Defendant Central Sales Tax against C-Forms at 4% under the Central Sales Tax Act 1956. If

> the obligation were to be delivery of goods at factory gate then the Plaintiff would have billed the Defendant Charging local Maharashtra Sales Tax. This fact is only indicative of the Plaintiff's false assertions and on merits would have little bearing because the defects in the products supplied by the Plaintiff could only be detected after the material was actually used by the Defendant and not at the Plaintiff's factory gate. If the Plaintiff is shirking its responsibility of the supply of defect free material because it is at its factory gate, then they ought to be non-suited in summary suit.

10. Perusal of the above quoted paragraph 12 from the affidavit of the Defendant shows that the Defendant does not dispute the position that as per the purchase orders placed by the Defendant on the Plaintiff, the Plaintiff supplied various types of flock binders to the Defendant. It is also clear from the affidavit filed by the Defendant, that according to the defendant out of all types of flock binders supplied by the Plaintiff to the Defendant,

only one flock binder namely Indofil FBSV was, defective. This position is clear from the statement made in various other paragraphs of the affidavit, also specially paragraph 30, that according to the Defendant, only of the flock binders supplied by the Plaintiff, controversial flock binder is FBSV. The Plaintiff has stated in paragraph 4 of the plaint that the Plaintiff is claiming in this suit the outstanding dues against the invoices which are mentioned in Exh.A. The relevant part of paragraph 4 reads as under:-

> The particulars of the various purchase orders of the Defendant and invoices issued by the Plaintiff are set out in the Statement of Outstanding Dues hereto annexed and marked Exhibit 'A'. The Plaintiff craves leave to refer to and rely upon the purchase orders and the invoices bearing the signature of the carrier/transporter with regard to the various supplies made by the Plaintiff, when produced.

11. The Plaintiff, thus, in the suit is claiming unpaid amount against the invoices which are mentioned in the chart at Exh.A. As observed above,

paragraph 4 of the plaint is replied to by paragraph 12 of the affidavit in defence which is quoted above. Perusal of that reply shows that the Defendant is not disputing the position that the amounts which are mentioned in the chart at Exh.A are unpaid and outstanding against the invoices which are mentioned in Exh.A. The case of the Plaintiff is that the amount that is shown as outstanding in the chart at Exh.A is not the price of only the flock binder FBSV, but the amount mentioned in the chart at Exh.A represents the unpaid price of various flock binders supplied by the Plaintiff to the Defendant including flock binders FBSV. Because in paragraph 12 quoted above of the affidavit of the Defendant, the Defendant has made a categorical statement that the subject matter of the suit is FBSV flock binders, I asked the learned Counsel appearing for the Plaintiff to demonstrate with reference to the invoices on which the Plaintiff has sought leave of the court to rely on that the amount which is shown as Outstanding in the chart at Exh.A also includes unpaid price of other flock binders than FBSV. Accordingly, the learned Counsel appearing for the Plaintiff has taken me through the relevant invoices. After having gone through the invoices I find as follows:-

Sr.No.	Invoice No.	Name of Flock Binder	Amount (Rs.)
1.	0202841	INDOFIL HA 8(I)	1,08,156.97
2.	101669	INDOFIL FLB	2,74,366.31
3.	101675	INDOFIL SVE	2,42,187.55
4.	0202894	INDOFIL HA 8(I)	7,02,610.02
5.	101703	INDOFIL FLB	3,00,496.76
6.	0202901	INDOFIL HA 8(I)	4,39,131.26
7.	0202902	INFOGIL HA 8(I)	2,63,478.76
8.	101721	39-FLB-D10 39-FLB-D11 39-FLB-D12 39-FLB-D15	5,87,927.81
9.	0202978	INDOFIL HA 8(I)	7,02,610.02
10.	0203015	INDOFIL ASE-63	4,93,569.02
11.	0203067/ 0203066	INDOFIL HA 8(I)	14,15,865.66
12.	646	INDOFIL.FIVER.2AF	3,47,307.42
13.	0203110	INDOFIL HA 8(I)	12,38,882.44
14.	0203126/ 0203127	INDOFIL HA 8(I)	14,15,865.66
15.	0203180	INDOFIL FIIER 2AF	7,95,880.06
16.	0203363	INDOFIL HA-16 INDOFIL FIIER 2AF	7,37,208.24
17.	0203446	INDOFIL HA 8(I)	6,37,139.55
18.	300103/ 300104	INDOFIL HA 8(I)	13,80,469.00

19.	34	INDOFIL HA 8(I)	18,473.31
20.	35	INDOFIL HA 8(I)	1,66,259.81
21.	64	INDOFIL TR-42	3,508.21
			1,22,49,412.32

12. Thus, according to the Plaintiff, Outstanding dues excluding the amount of interest in relation to the flock binders other than FBSV flock binders comes to Rs.1,22,49,412.32. After getting myself satisfied by going through the invoices and the chart at Exh.A that the Plaintiff is claiming in this suit the amount of Rs.1,22,49,412.32 as unpaid price of the flock binders other than the FBSV flock binders and as the defendant has not raised any dispute about the quality of those flock binders, I put it to the learned counsel appearing for the Defendant that the Defendant should voluntarily agree to deposit the unpaid price of other flock binders in court to show it’s bonafides. But the learned counsel appearing for the Defendant did not agree to this suggestion. It is absolutely clear that out of the total amount claimed by the Plaintiff in the suit so far as the amount of Rs.1,22,49,412.32 is concerned, there is no defence whatsoever put forth by the Defendant.

13. The next question that is to be considered is whether the defence put up by the Defendant in relation to unpaid price of the FBSV flock binders can be said to have substance or it is merely a moon shine defence. In so far as this aspect of the matter is concerned, it is an admitted position that the flock binder FBSV of which unpaid price is also claimed in this suit was admittedly supplied by the Plaintiff to the Defendant and not a single drum of FBSV flock binder supplied by the Plaintiff to the Defendant has been returned by the Defendant to the Plaintiff. Either it has been consumed by the Defendant or it is still lying unused with the Defendant. The case of the Plaintiff as found in paragraph 5 of the plaint regarding quality of this type of flock binder is that the Plaintiff manufactures the flock binders on the basis of standard composition. The Defendant while placing up orders for supply of flock binders did not specify any requirement or composition for the flock binders to be supplied to the Defendant. Perusal of the purchase orders placed by the Defendant on the Plaintiff shows that all that the Defendant required

in so far as quality of the product is concerned is that the Plaintiff to supply its test report along with test method along with the product. The Plaintiff has stated in paragraph 5 of the plaint that each time the Plaintiff was supplying the flock binders, test report was also being supplied to the Defendant. The Plaintiff claims in paragraph 5 that the Defendant never disputed any of the certificates of analysis, which were submitted by the Plaintiff. Paragraph 5 of the plaint is replied to in paragraph 13 of the affidavit of the Defendant. It reads as under:-

> 13. The contention of paragraphs 5 and 6, it meant to convey that the Plaintiff had been manufacturing the flock binders of standard composition and that the test reports called Certificates of Analysis were issued which were found satisfactory upto December, 2004 then the contents are admitted. However, the Defendant were led to believe that the material supplied between December, 2004 to the last supply of 19th March, 2005 would also be of the same standard, as it was backed by similar certificate like Exhibit-D to the

> Plaint. The Defendant was lulled into complacency by the past experience and therefore did not dispute any of the certificates of analysis. They also had placed implicit faith in the goodness of the supplies and did not put the material to test on each and every supply. The material supplied was actually used upto 31-3-2005 as the Defendant would need to keep the supplies ready and available at the time of production which was a few weeks later after the supply.

14. Perusal of the above paragraph shows that the Defendant does not dispute that each supply of flock binders by the Plaintiff to the Defendant was accompanied by certificate of analysis. It is also not disputed that at no point of time any certificate of analysis was disputed by the Defendant. The Defendant also does not dispute that at no point of time the Defendant specified different requirement, in so far as the quality of flock binders is concerned. In paragraph 8 of the affidavit, the Defendant states that there is no complaint about the FBSV flock binders supplied upto December, 2004. So far as the flock binder FBSV supplied after December,

2004 is concerned, it was also used by the Defendant in manufacture of flocked fabrics. At the time of manufacturing the flock fabrics the Defendant did not detect that the material supplied by the Plaintiff is defective. They came to know that the material supplied by the Plaintiff is defective, only when their customers to whom they sold the flocked fabrics manufactured by them complained about the quality of the flocked fabrics and this happened in February, 2005. Following from paragraph 8 of the reply is relevant. It reads as under:-

> "It appears that there was no deficiency in the supply of FBSV binder upto December 2004. The adhesive supplied around and after December, 2004 was of sub standard quality. The adhesive was consumed in a few weeks time, in preparation of end products i.e. flock fabric. The defendant supplied this product to the whole sellers who in turn supplied the same to the retailers all over India. The complaints from customers via retailers and whole sellers started percolating in about a few months. Thus until February 2005 the defendant did not learn about the damages caused to their end products. Since the

complaints started coming in large number, the defendant could not afford to make payment for the pending invoices."

15. The Defendant further states that as the Defendant came to know in February, 2005 that product supplied by the Plaintiff is defective, the Defendant opened some sample drums randomly and found that the product was defective and therefore, a meeting between the representatives of the Plaintiff and the Defendant was held on 12th March, 2005. Minutes of that meeting are on record. It is stated in those minutes that the Plaintiff was informed on phone by the Defendant "that lumps were observed in FBSV binders supplied by them." Then it is recorded " It was informed to Mr.Neeraj Gupta, that TRV were facing abrasion problem in FBSV binder for the last about 4 days." and "TRV have been noticing polymerized particles in the FBSV binder for the last about a week." It is further stated that on 11-3-2005 in two drums of FBSV binders batch No.05-01-39 big lumps were observed. It is stated that the representative of the Plaintiff saw the defective drums and he took the sample. From these minutes, it appears that so far as FBSV binder is concerned, the Defendant was

facing abrasion problem in last about 4 days before 12-3-2005 and they were noticing polymerized particles in the FBSV binder for about a week before 12-3-2005. In the minutes, it is stated that the Defendant continued to use the product though it was found to be defective. Immediately on 14th March, 2005 the Defendant informed the Plaintiff that in two drums supplied by the Plaintiff to the Defendant polymerized lumps weighing 5 kgs. each were found. The Plaintiff advised the Defendant not to use the material. But it is clear from the affidavit of the Defendant that the Defendant continued to use the material till 31-3-2005. From the affidavit of the Defendant it is not clear that if the material was defective and if the defect could be found by the Defendant by opening two sample drums and if all other drums supplied by the Plaintiff had the same defect, why it was not detected when the Defendant was using that material in the manufacturing process of the flocked fabric. If there were lumps formed in all the drums supplied by the Plaintiff, it could have been detected by the Defendant while using the product in manufacturing the flocked fabric unless the material was used without opening the drums. According to the Defendant, FBSV binder supplied by

the Plaintiff was used by the Defendant till 31-3-2005 and according to the Defendant the product supplied by the Plaintiff is defective because the customers of the Defendant found that the flocked fabric is defective. According to the Defendant, the flocked fabric manufactured by the Defendant has become defective because the flock binder supplied by the Plaintiff, which was used by the Defendant for manufacturing the flocked fabric was defective. Now, according to the Plaintiff, for manufacturing the flocked fabric it is not only the flock binder supplied by the Plaintiff which is used, but there are other things also that go into manufacture of flocked fabric. The Defendant in paragraph 21 of the affidavit says

"The Defendant used only Plaintiff’s flock binder. The thickeners, fixers, etc, are indeed mixed to create a paste which is then applied on the fabric to be flocked. This allegation was not even made at the time of meetings of the technical persons sent by the Plaintiff from time to time. This is clearly an after thought. It is, therefore, denied that the defective end product could be a result of a defect in any of the items used while making the paste or

there is fault in the process of making the paste or in the process of manufacturing flocked fabric etc."

16. The Defendant is,thus, admitting that apart from the flock binder supplied by the Plaintiff other material is also used for manufacturing the flocked fabric , but the Defendant is denying that the defect in the flocked fabric manufactured by the Defendant could be the result of defect in any of the other material that goes into manufacturing the flocked fabric. But the Defendant does not give any reason why the Defendant says so. From the affidavit filed by the Defendant, it appears that the Defendant refuses to pay the unpaid price of the material supplied by the Plaintiff, because according to the Defendant it was required to pay Rs.2.5 crores to its customers because the flocked fabric supplied by the Defendant to them was found to be defective. If this is the defence put up by the Defendant then to show that this defence has substance, it was for the Defendant to disclose what is the manufacture process of the flocked fabric, what material is used in manufacturing the flocked fabric and as to how the defect that was detected by the customer of the Defendant in the flocked fabric is attributable only

to the defect in the flock binder supplied by the Plaintiff and not either to any defect in other material that goes in to manufacture of the flocked fabric or to any defect in the manufacture process of the flock binder. The Defendant has done no such thing. The Defendant has not made even an attempt to show why it was not possible for it to detect any defect in the flock binder supplied by the Plaintiff at any time before using the flock binder in the manufacturing process or during the manufacturing process or after completion of the manufacture process before supplying the product to the customers. Failure of the Defendant to disclose these above-mentioned things which were within their special knowledge make them liable for an adverse inference to be raised against them that had they disclosed these things it would have gone against them.Thus so far as the defence that has been put up by the Defendant in relation to non-payment of unpaid price of FBSV binders is concerned, the defence put up by the Defendant cannot be said to be substantial. But it also appears that in some of the drums, product supplied by the Plaintiff was found to be defective. It is true that the case put up by the Defendant that it was required to pay huge amount to

its customers through credit notes cannot be believed at this juncture, because though the Defendant relied on credit notes in the affidavit in reply, it failed to give inspection of those credit notes to the Plaintiff. Still, in my opinion, an opportunity can be given to the Defendant to substantiate its defence in relation to unpaid price of FBSV binders. But so far as the unpaid price of flock binders other than FBSV are concerned, there is absolutely no defence put up by the Defendant. Taking overall view of the matter, therefore, in my opinion, following order would meet the ends of justice:

O R D E R

(i) In case the Defendant deposits in this Court an amount of Rs.1,22,49,412.32 within a period of six weeks from today, with due intimation to the Plaintiff, this summons for judgment will stand disposed of and leave to defend shall stand granted to the Defendant. In that event the Defendant shall file its written statement within a period of eight weeks from the date of deposit.

(ii) On the amount being deposited the Plaintiff may

be permitted to withdraw the amount on furnishing the bank guarantee of the nationalised bank to the satisfaction of the Prothonotary & Sr.Master of this Court, and filing an undertaking, undertaking to this court to bring back the amount, if so, directed by this court and on such terms and conditions as may be directed by this court. The undertaking shall also include a statement by the Plaintiff that in the event the Plaintiff is directed to bring back the amount, the rate of interest shall not be less than 12% p.a.

(iii) In case the above referred amount is not deposited by the Defendant as directed above, this summons for judgment shall stand granted and the suit of the Plaintiff shall stand decreed in terms of prayer clauses (a) & (b) of the suit.

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